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IN THE

Supreme Court of the United States

October Term 1972

72-958
No. A-560

LOUIS CIRILLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
Attorney for Petitioner
401 Broadway
New York, New York 10013
(212) WA 5-5937

ALAN SCRIBNER
IVAN S. FISHER
JOEL FINKELSTEIN
Of Counsel

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Louis Cirillo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 6, 1972.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix to this brief. No opinion was rendered by the District Court for the Southern District of New York.

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Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 6, 1972. On November 27, 1972 an order was granted by Mr. Justice Marshall extending the time to file the petition for certiorari to and including January 5, 1973. This petition was filed within that period. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254 (1).

Questions Presented

1. Did the proof at trial establish two separate and independent conspiracies in variance with the indictment which charged one conspiracy?

Was the petitioner denied due process and a fair trial where 220 pounds of heroin from the second conspiracy in which the petitioner did not participate was introduced in evidence against him?

2. Was a fair trial denied where unwarranted and inflammatory collateral attacks upon the character of the petitioner were made against him at trial?

3. Was the jury improperly allowed to consider hearsay evidence of co-conspirators to determine whether the petitioner joined the conspiracy?

Statement of the Case

The petitioner, Louis Cirillo, was charged by indictment with one count of conspiracy[1] to violate 21 U.S.C. §812,

1. The indictment, although charging Cirillo alone, alleged that the following persons were co-conspirators: John Anthony Astuto, Richard Berdin, Antoine Grisoni, Andre Labay, Andre Lajoux, a/k/a Dede, Michel Mastantuono, Roger Priess, a/k/a Eric and Patrick Carlson, Joseph Signoli, and John Doe.

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841(a)(1), 841(b)(1)(A), 951(a)(1) and 952 and one count of distributing and possessing with intent to distribute a controlled substance, heroin, in violation of 21 U.S.C 812, 841(a)(1) and 841(b)(1)(A). He was tried before a jury and the Honorable Edward Weinfeld. The jury returned a verdict of guilty on both counts and on May 25, 1972 Judge Feinfeld imposed a sentence of twenty-five (25) years imprisonment on each count, the sentences to run concurrently.

On November 6, 1972, the judgment was affirmed by the Second Circuit Court of Appeals in an opinion by Judge Kaufman.

Statement of Facts

The Government's case was based principally on the testimony of an alleged co-conspirator, Roger Priess. In substance, Priess' testimony related to two separate transactions, one occurring in July and August of 1971, the other occurring in September and October of 1971.

The July-August Transaction. In the summer of 1971, Roger Priess, a French national, met with Richard Berdin, an alleged co-conspirator, in Paris, France. Berdin discussed with Priess the possibility of traveling to the United States on behalf of Joseph Signoli, also an alleged co-conspirator (R. 103-109).[2] According to Priess, Berdin asked him "to be a future go-between the person he takes the drugs from in the United States and * * * the buyers"[3] (R. 118). Andre Labay, so Priess testified, would transport the drugs to the United States (R. 118).

2. References preceded by the letter "R." refer to the minutes of trial.

3. Priess spoke good, but broken English, which substantially affected his grammar and usage.

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Approximately ten days later, some time in July of 1971, Priess had a conversation with Berdin and Signoli in Paris (R. 111). During this conversation, Priess was told by Berdin that he would travel to the United States, and that there was no problem with money, the passport, or the ticket. Berdin asked Priess for two photographs to be used on his passport (R. 112). Approximately eight days later, Priess met with Signoli and gave him the two photographs. Signoli and Priess went together to a hairdresser in Paris located near Pigalle where Signoli obtained a passport for himself and an undescribed paper apparently for Priess. Priess later received from Signoli a passport in the name of Patrick Lorentz (R. 113-116).

Priess and Signoli left Paris on August 10, 1971, and traveled by train to Frankfurt, Germany (R. 120). En route to Frankfurt, Signoli told Priess that he (Priess) was to go directly to New York while he (Signoli) would go to Montreal and Miami and would meet him later in New York (R. 121). Signoli gave Priess $2,000 before arriving in Frankfurt (R. 122).

According to Priess, Signoli also gave him two telephone numbers together with two addresses asking Priess to write them in code and stating that they referred to the buyers (R. 122). The addresses Priess wrote were 9940 63rd Road, New York, and 3143 Lee Street, Miami, the telephone numbers decoded were (N.Y.) 263-8093 and (Miami) 966-2832.[4]

4. A paper taken from Priess upon his arrest was identified by Priess as the paper on which he wrote the numbers and the addresses (R. 123, Gov't. Exh. #1). According to the respective telephone companies, the New York and Miami addresses and telephone numbers were listed to Mary Schiotis (R. 780-786, 815-818). The Government produced evidence to show that during the summer of 1971 Cirillo lived with a woman at 3143 Lee Street, Hollywood, Florida, under the names Mary and Louis Schiotis (R. 566-574).

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Upon arriving in Frankfurt, Priess and Signoli went by taxi to the International Airport (R. 126). In Frankfurt, Signoli apparently changed his plans and told Priess that he should go to Montreal, Miami and New York with him, rather than travel directly to New York (R. 126). Priess purchased a ticket from Lufthansa in the name Patrick Lorentz routed from Frankfurt to Montreal, Montreal to New York, or Montreal to Miami, Miami to New York, New York to Montreal, Montreal to Frankfurt (R. 127). He also purchased a ticket for Signoli in the name of Yvon Tournier (R. 126).[5]

Signoli and Priess flew to Montreal arriving on August 11, 1971 (R. 130). After going through immigration, Priess and Signoli went to the Hotel Windsor in Montreal where Priess registered for both men using the name Patrick Lorentz (R. 132).[6] From the Hotel Windsor, Signoli called a friend later identified as Michel Mastantuono, an alleged co-conspirator (R. 135-136). Later Signoli and Priess met with Mastantuono in a restaurant in Montreal. The following day, Signoli and Priess again met with Mastantuono, this time in Mastantuono's apartment (R. 138). At Mastantuono's apartment, Priess met with Danielle Quimet who was introduced as Mastantuono's fiancee (R. 138-139).

According to Priess, he, Signoli and Mastantuono left Mastantuono's apartment and drove to an unidentified house in Montreal but, upon learning that no one was home, the three men returned to Mastantuono's apartment (R.

5. The plane tickets were offered and received in evidence (Government Exhibits #2 and #3, R. 129).

6. The bill at the Hotel Windsor paid by Priess was offered and received in evidence (Government Exhibit #5, R. 133).

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139). Signoli and Mastantuono then left together returning several hours later with Mastantuono carrying a Samsonite suitcase containing American dollars (R. 140-141).[7]

The next day, Priess and Signoli checked out of the Hotel Windsor, and were driven to the airport by Mastantuono (R. 141-142). On the way to the airport, Signoli asked Priess to fly to Miami alone, to go to the Newport Hotel, and to meet him (Signoli) the next day as he would arrive on the same flight one day later (R. 142). In accordance with Signoli's request, Priess flew to Miami, and registered at the Newport Hotel under the name Patrick Lorentz (R. 142-143).[8]

The following day, Priess met Signoli at the Miami airport as pre-arranged and together they went to the Newport Hotel (R. 146). At the hotel, using a pay telephone Signoli called a friend identified as Louis (R. 146). After the telephone call, Signoli told Priess, so Priess testified, that he had an appointment with Louis which he was to keep alone (R. 147). A few hours later, Signoli and Priess left the hotel and walked for a short time together; upon leaving Priess, Signoli stated he was going to his appointment (R. 147). Approximately ten minutes later, Priess walked past a Howard Johnson's where he saw Signoli sitting with a man he identified as the petitioner Cirillo (R. 148-149). Later, when Priess met Signoli at the hotel, Priess told Signoli that he saw him with his friend Louis (R. 149). According to Priess, Signoli asked him if he still had Louis'

7. The testimony is unclear as to whom the money was intended for.

8. The bill at the Newport Hotel paid by Priess was offered and received as evidence (Government Exhibit #7, R. 143-144).

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phone numbers and addresses, advising him not to tell Louis that he had this information (R. 150).

Priess testified that a day or two later he met Cirillo at the International House of Pancakes in Miami. Priess was with Signoli and Cirillo was with a man referred to as Joe and later identified as John Astuto, an alleged co-conspirator (R. 151-154). Priess was introduced to Cirillo by Signoli as Patrick (Tr. 156). According to Priess, Signoli told Cirillo that Priess was his future representative in the United States (R. 157). And, again according to Priess, Cirillo introduced Astuto and told Priess if he had any problem with drugs in the future he should see Astuto (R. 157-158).

Priess further testified that Signoli asked Cirillo to get Priess an apartment in Miami, and Cirillo agreed (R. 158). According to Priess, Cirillo then drove Priess and Signoli to an apartment building where Cirillo and the men entered an apartment which Cirillo identified as his own (R. 159, 167).[9] Cirillo told Priess and Signoli that he could rent such a place for Priess (R. 159).

Pries testified that at the apartment he overheard a conversation between Cirillo and Signoli in which Cirillo criticized Signoli for contacting a buyer in New York who was an agent of the Bureau of Narcotics and Dangerous Drugs (hereinafter referred to as the BNDD). According to Priess, during the course of the conversation Cirillo agreed to purchase heroin from Signoli at $10,500 a kilo, $500 more

9. The apartment building was later identified as the Sussex House in Miami Beach. The resident manager testified that Cirillo was a tenant in the building and was known to her as Bernard Reitman (R. 554-556).

per kilo than the price Cirillo originally wanted to pay (R. 169).

Priess testified that at the apartment he overheard a conbecause Cirillo liked the frames and wanted to use them for sunglasses (R. 169). He further testified that Signoli mentioned that he gave Cirillo a ring which Cirillo was wearing (R. 170).[10] According to Priess, Cirillo asked Signoli when it would be necessary to leave Miami for New York because he needed some drugs, and Signoli answered "next week." Signoli also told Cirillo, so Priess testified, that the drugs were coming in a car, and that the car had arrived in Canada. Signoli asked Cirillo to be in New York the next week and to make the payment in $100 bills. According to Priess, Cirillo agreed (R. 171-172). The men left the apartment and Cirillo drove Priess and Signoli to their hotel (R. 173).

Priess said he saw Cirillo once more before leaving Miami, this time in the bar at the Newport Hotel. Cirillo was accompanied by Astuto. However, there was no conversation between the men (R. 173).

Signoli and Priess checked out of the hotel on August 20, 1971, and flew to New York. Priess testified that their tickets were given to them by Astuto, and Priess' ticket was in the name of Patrick Carlson (R. 174). En route to New York, Signoli told Priess to register at the Abbey Victoria Hotel on 7th Avenue and 51st Street in the name of Patrick Carlson which Priess did (R. 175-176). Priess went to the hotel alone (R. 175). Later the same day, he met Signoli

10. Priess identified a ring taken from Cirillo upon his arrest as the ring mentioned in the conversation (R. 170, 796-798).

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and, within a day or two, he and Signoli met Astuto at a coffee shop on Seventh Avenue near Carnegie Hall (R. 179). During the course of this meeting, Astuto asked if everything was okay at the hotel and Priess answered affirmatively (R. 180). A day or two later, Signoli and Priess met Mastantuono and his girl friend, Danielle, near St. Patrick's Cathedral on Fifth Avenue. Also present, according to Priess, was a man identified only as the man from Marseilles (R. 181). Signoli asked Mastantuono, "where is the car?" and Mastantuono took them to a car with Canadian license plates parked either on Fifth Avenue or Park Avenue (R. 181-182). Mastantuono identified the car as the car with the "drug" (R. 187). Signoli then asked Priess to be ready the next day at 7:30 A.M. at the corner of 51st Street and Eighth Avenue, and Priess agreed (R. 187). The meeting thereafter broke up.

Later the same day, Signoli and Priess went to the coffee shop near Carnegie Hall where, according to Priess, they met with Astuto and Cirillo (R. 188-189). Signoli said everything is okay, and the men separated (R. 193).

The following day at 7:30 A.M., Priess met with Signoli and Astuto at 51st Street and 7th Avenue. Signoli was carrying a small package (R. 193-194). Priess, Signoli and Astuto left the area in Astuto's car. As the men were leaving the area, Signoli pointed to a parked car, the same car that Mastantuono referred to the day before, and told Astuto that it was the car with the "drug" (R. 195). Astuto drove around the block, stopped, placed a phone call from a phone booth, and drove back to the place where they had observed the car with the "drug" (R. 195). Priess ob-

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served Mastantuono and the man from Marseilles in the car (R. 195). Mastantuono drove following Astuto and the others as they drove from the city, across the George Washington Bridge into New Jersey (R. 197).

They drove to a house in New Jersey[11] where Astuto left the car, rang the doorbell and, after someone answered the door, Astuto opened the garage door. Mastantuono drove his car into the garage (R. 198). All the men then entered the garage and closed the door (R. 198).

Inside the garage, Mastantuono took a diagram of the car from his pocket and the men dismantled the car (R. 204, 215-217). In the meantime, Signoli opened the package he brought, took out a T-shirt and blue jeans, and changed clothes (R. 204). In dismantling the car, the men removed from it plastic packages containing white powder (R. 205-208). According to Priess, each package contained 500 grams (½ kilogram) of heroin (R. 207). The packages were removed from the car; some were placed on the car's hood (R. 207). Priess testified that Astuto placed 20 packages at a time in a blue duffel bag and carried them into the house (R. 207-208). Astuto made several trips into the house with the loaded duffel bag (R. 208). Priess further testified that a total of 83 kilos was unloaded from the car (R. 220).

Priess testified that he had difficulty in removing one of the packages from the car, ripping the container and spilling some of its contents on the floor of the garage (R. 209-

11. Tho house referred to by Priess, it later developed, was the residence of Rudolph Guinta, 347 Westview Avenue, Fort Lee, New Jersey (R. 581). According to Guinta, he lent the key to his garage to Astuto upon Astuto's request (R. 583-584). Astuto had asked to use the garage the weekend preceding August 22, 1971 (R. 584).

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210). Signoli told Priess to be careful, claiming the powder was dangerous, and complained about losing money (R. 210). Signoli then asked Astuto to get a spoon which he did, and Priess began to scoop the spilled contents from the floor. Astuto, however, complained that he could not use the spilled portion, but Signoli answered that he could filter the powder (R. 210). According to Priess, the spilled contents smelled like vinegar (R. 214).[12]

In removing the packages from the car, Signoli noticed that two of them contained a yellow substance. Astuto took the packages, smelled the contents, and said he would check the substance (R. 218-219).

After unloading the car, Mastantuono and the man identified only as the man from Marseilles showered. Signoli changed back into his street clothes. The men then left the garage in Astuto's car, and Astuto drove them to a taxi stand (R. 222-223). Priess, Signoli, Mastantuono, and the man from Marseilles took a taxi to mid-Manhattan (R. 224).

Later the same day, Priess, Signoli, Astuto and the man from Marseilles met at a restaurant near Carnegie Hall (R. 226). There, Astuto invited the men to an apartment. Priess testified that Signoli explained that Cirillo always paid for a party with girls after each operation (R. 227). And so, according to Priess, Astuto took the men to an apartment where Priess was introduced to a girl named

12. On February 2, 1972, Michael Wanieski, an agent of the BNDD, executed a search warrant at the Fort Lee address. He was accompanied by several agents and a chemist. The chemist with a vacuum swept particles from the floor of the garage and later analyzed them (R. 620-621, 632, 687). The chemist found heroin in some of the substances swept from the garage floor (R. 698).

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Barbara (R. 228). Several hours later, so Priess testified, Cirillo joined them (R. 229).

According to Priess, Signoli asked Cirillo if the yellow packages were okay, and Cirillo answered that there was no problem, that he would pay for 83 kilos (R. 230). Priess testified that Cirillo told him to call a person and to try to remember the voice, that the person whose voice Priess was to remember was his contact with Astuto. Astuto placed the call and Priess listened to a female voice (R. 230). Astuto gave Priess the telephone number telling him that the girl's name was Barbara and that she was his contact.[13] Astuto told Priess never to call Barbara from the telephone in the hotel room, but rather to use a pay telephone (R. 231).

Signoli and Cirillo left the apartment (R. 232). A few moments later, Priess left the apartment accompanied by Astuto and the man from Marseilles (R. 232).

Priess saw Signoli the following morning in his hotel room. Signoli had a large Samsonite suitcase filled with $100 bills (R. 233). Priess testified that Signoli told him that the suitcase contained $300,000 (R. 234). Signoli then hid the money within the suitcase by gluing it under the suitcase's interior lining (R. 234-235).

Later, Priess obtained a plane ticket in the name of Yvon Tournier for Signoli's return to Europe (R. 235-237).

13. Barbara Schmidt testified that she knew and had dated Astuto and that in August, 1971, she received a phone call from Astuto late one evening (R. 777). She said the next day she met Astuto who told her that a man named Patrick had listened to the conversation for the purpose of recognizing her voice, that Patrick was to contact her in a couple of weeks, that he (Astuto) did not want Patrick to have his telephone number, and that Patrick was to contact him through her (R. 779).

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Before leaving, however, Signoli gave Priess $2,000 and two telephone numbers where he said he could be reached in France (R. 238-239). Priess wrote the numbers on the same card he had written Barbara's number (R. 239-240). He and Signoli then went to Bucherers to buy Cirillo a watch (R. 243-244). (According to Priess, Signoli had spoken to Cirillo about buying him a watch when they met in Miami at Cirillo's apartment (R. 246).) Priess made the purchase using the name DeMarsan (R. 248).[14]

Two or three days later, Priess left the country, returning to France (R. 251, 254).

The September-October Transaction. In September, 1971, Priess met with Berdin in Paris (R. 254). Thereafter, Berdin and Priess met with Andre Labay, another alleged co-conspirator. According to Priess, Labay told them that he found a new possibility for transporting heroin from France to the United States, that he was not going to use the car system again (R. 255). Labay said he could ship heroin from France to the United States in 24 hours by plane in a suitcase and asked Berdin for $2000 for each kilo. Berdin agreed (R. 256-257). Labay said he wanted to be paid immediately in cash upon delivering the heroin in New York, and Priess answered that this was no problem (R. 257). Berdin then told Labay that he was to have a meeting with a group known as the Picpus gang and would discuss the matter. And Labay responded telling Berdin that the first job he would take 100 kilos and two weeks later he would take 200 or 300 kilos (R. 257-258).

14. Priess identified the watch which was taken from Cirillo on his arrest as the watch he purchased at Bucherers (R. 250, 615-616, 797-798).

Berdin and Priess left the apartment together. Upon leaving, Berdin told Priess that he had a meeting with Tony and Dede, members of the Picpus gang (R. 258-259). Berdin asked Priess to act as his go-between at this meeting, and Priess agreed (R. 258).

Two or three days later, Priess met with Tony and Dede, and two unidentified men, Berdin having made the arrangements (R. 259). Tony was later identified as Antoine Grisoni and Dede was later identified as Andre Lajoux, both alleged co-conspirators (R. 260). Tony asked Priess if Labay was serious and when Labay wanted the heroin. Priess responded that he was merely a go-between and that he would find out from Labay when he would be ready (R. 260). Berdin intended to use his own American buyer named Soderini who would pay $11,000 a kilo for heroin (R. 261). However, Berdin told Priess he was not sure his buyer would pay cash for 100 kilos, $200,000, and asked Priess if he would take the responsibility with the buyer he knew, Cirillo (R. 261-262). Priess answered that Cirillo was Signoli's buyer and that he could not work with Cirillo without Signoli finding out (R. 263). Priess said he would have to talk with Signoli first (R. 264).

Priess thereafter went to Marseilles, called Signoli on one of the numbers Signoli had given him, and met with him. According to Priess, Signoli agreed to permit Priess to sell the heroin to Cirillo (R. 264, 268). Signoli told Priess that Cirillo is a buyer for others, including one Charlot, and that if Cirillo paid $10,500 per kilo, $9,000 a kilo was for Berdin, and the rest was for Signoli and others (R. 265-267).

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Priess returned to Paris and met several times with Lajoux, Grisoni, and Labay (R. 268). On one occasion Labay showed Priess a type of suitcase and asked Priess to purchase five such models (R. 272). Grisoni, Lajoux, and Priess went to a shop where Priess purchased five such models giving the name DeMarsan (R. 273). Grisoni and Lajoux took the suitcases (R. 273).

Priess then met with Labay again. Labay told Priess he wanted the suitcases with heroin two days later at the place near his apartment (R. 279). In talking about the next shipment, Labay asked if it was necessary to go through Berdin stating that he preferred to use Signoli's buyer (R. 279-280). Priess responded, "No, it is not necessary" (R. 280). Labay then told Priess he would meet with him at one of the bars in the Waldorf-Astoria in New York and he warned Priess to be careful, telling him a BNDD agent named Guy was in Paris, and that Guy knew many people in the traffic (R. 280).

Later, Priess met with Grisoni and Lajoux telling him that Labay wanted the heroin this particular day, and Grisoni and Lajoux called Berdin (R. 281).

Labay asked Priess to be ready with the heroin at 10 A.M. on October 6, 1971 (R. 282). Priess, in the meantime, asked Grisoni and Lajoux to be ready with the heroin at 9:30 A.M. (R. 282). Lajoux picked up Priess in his car and gave Priess the key to a Volkswagen with the suitcases which, as Lajoux told Priess, was parked in front of the Jours de France office (R. 282). Priess then met with Labay and gave him the key (R. 282-283). Priess and Labay found the Volkswagen parked in front of the Jours de France and observed Grisoni and Lajoux nearby.

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Labay asked Priess to be at the Waldorf on October 7, 1971, and Labay got in the Volkswagen and left (R. 283).

After Labay drove off, Priess asked Grisoni and Lajoux for his plane ticket to New York. Although Grisoni and Lajoux acted surprised, Lajoux gave Priess 2000 francs for his plane ticket and told him if he needed money in New York to get it from Berdin (R. 285).

Priess bought a KLM ticket routed from Paris to Amsterdam and then to New York and New York back to Amsterdam. The ticket was purchased in the name of Patrick Chagnon, the name on the passport Priess had purchased from the hairdresser near Pigalle (R. 285-286, 288).

Priess arrived in New York on October 7, 1971, and checked in at the Hotel Sheraton. He went to the Waldorf-Astoria to meet Labay and there he was arrested by agents of the BNDD (R. 290).

In the meantime, on October 6, 1971, Labay was arrested by the French authorities in a parking section of a shopping center in a town outside Paris called Marly le Roi (R. 508). Labay arrived at the shopping center in the Volkswagen containing the suitcases. The suitcases were seized by the French authorities and found to contain approximately 200 transparent packages filled with white powder which, when analyzed, was found to be approximately 101 kilos of heroin (R. 508, 514, 519, 525-526).

On October 12, 1971, Cirillo was arrested after he was observed by agents of the BNDD at his residence at 3143 Lee Street, Hollywood, Florida (R. 788-789). At the time

of his arrest, Cirillo was wearing the watch and ring which were later identified by Priess during the course of his testimony (R. 797-798).

Once in police custody, Priess and the agents attempted to contact Astuto, but were unsuccessful (R. 314-15, 415).

The Cross-examination of Priess. The cross-examination of Priess explored several areas. Priess' prior criminal record was the subject of some inquiry, although it was mentioned on direct. Priess was first convicted of a crime in 1962, receiving stolen property, for which he received two years imprisonment (R. 367). He subsequently served three years for passing a bad check, a term which expired in 1967, and was banished from Paris for five years (R. 101-103, 364-366, 369). Priess was also questioned concerning his means of earning a livelihood aside from narcotics activity. Priess testified that he was an interior designer and in 1970 designed some six homes (R. 374). Preiss refused, however, for what he called security reasons to give the names and addresses of the persons whose homes he designed (R. 374). During a voir dire outside the presence of the jury, Priess said some people were threatened when the fact of his arrest was published and that his customers abandoned their homes and changed their addresses (R. 379).[15] Relying on this testimony, the court sustained the government's objection and would not permit appellant's counsel to explore this area of cross-examination (R. 380).

Priess' motivation for testifying was also the subject of inquiry. Priess acknowledged that he was under indict-

15. On voir dire, Priess said he did not remember the addresses but could describe the locations (R. 379-380).

ment charging conspiracy to commit narcotics offenses and possession of 80 kilos of heroin, that he expected to plead guilty, that the maximum term that could be imposed was thirty (30) years, and that the court would be advised of his cooperation (R. 406-410, 412, 413, 415-419).

Priess was severely impeached by prior inconsistent statements made to the grand jury and to the authorities. Although Priess testified on direct examination that he first met Cirillo in Miami, he acknowledged that he told agents of the BNDD after his arrest that he was first introduced to Cirillo in New York (R. 305). Later, in his testimony, Priess said he could not recall the questions put him by the agents concerning his introduction to Cirillo, nor could he recall his answer (R. 306-312, 316-318). And although Priess testified on direct that he saw Cirillo on four occasions in Miami (once with Signoli at the coffee shop, once with Signoli and Astuto at the Pancake house, once with Signoli at Cirillo's apartment, and once at the Newport bar), he acknowledged that in his affidavit signed and dated January 3, 1972, he said he saw Cirillo only twice in Miami (R. 331). In this connection he was confronted with his grand jury testimony in which he mentioned only seeing Cirillo with Signoli on a street corner in Miami and again seeing Cirillo at the Newport bar (R. 337-348).

Priess testified on direct that, when he told Signoli that he saw Signoli and Cirillo at their first meeting, Signoli asked about the phone numbers and addresses he gave him and advised him not to mention this to Cirillo. Priess testified before the grand jury, however, that Signoli said nothing special when he told Signoli he had accidentally seen him

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with Cirillo at the coffee shop (R. 460-462). Priess was further impeached with his grand jury testimony, for before the grand jury Priess did not say that Cirillo was present at the meeting in the coffee shop in Miami which he described in his direct examination (R. 429-431). Nor did Priess mention Cirillo's presence at his (Cirillo's) apartment in Miami either in his grand jury testimony or his affidavit, although he did mention it in a confession he composed (R. 436).

Priess testified on direct that he and Signoli met with Cirillo and Astuto in New York before going to New Jersey with the Volkswagen; he did not testify, however, before the grand jury that he saw Cirillo in New York before going to New Jersey (R. 440).

Priess was further impeached when he was confronted with his grand jury testimony which failed to mention Cirillo's presence at the apartment in New York when Astuto called Barbara (R. 445-447). In fact, although Priess testified on direct that Cirillo told him to make the call to Barbara, Priess testified before the grand jury that Astuto had told him to make the call (R. 447). Indeed, according to Priess' grand jury testimony, the last time he saw Cirillo in New York was briefly at a meeting somewhere near Seventh Avenue (R. 442-445).

On voir dire out of the presence of the jury, Priess testified that the reason for his prior inconsistent statements was that at the time he made them he feared reprisals from Cirillo. Priess testified that Signoli told him that Cirillo had buyers who were BNDD agents, that Cirillo was a dangerous man, and that, if he talked, he would go to jail and die (R. 469-473). However, when arrested and prior to

testifying before the grand jury, Priess told agents of the BNDD about Cirillo, that Cirillo was Signoli's buyer, that he met Astuto through Signoli and Cirillo, and that Cirillo paid for the heroin shipped in August (R. 474-475). Priess said that although he told the authorities about Cirillo, he was afraid to tell the grand jury (R. 477-478). The court cut short the voir dire examination of Priess by defense counsel and ruled that Priess could offer his explanation for prior inconsistent statements to the jury (R. 479-482).

In the presence of the jury, and following the court's instruction on the purpose for which the testimony was being admitted, Priess testified in substance that his testimony before the grand jury was inconsistent with his present testimony because he feared retaliation from Cirillo. He said he was told by Signoli that Cirillo had connections with the BNDD and the police in New York, that Cirillo was a very dangerous man, that it was better never to talk about Cirillo and that, if he did talk, he would be killed (R. 486-488).

On re-cross, Priess again acknowledged as he had done on voir dire that he had told the authorities upon his arrest about Cirillo's narcotics activities (R. 489-492).

The Testimony of Joseph Bux. Over the objection of defense counsel, the Government introduced the testimony of Joseph Bux (R. 821). Bux testified that during the latter part of March 1971 he met with Cirillo at the office of a bondsman located at 77 Baxter Street in New York (R. 827). According to Bux, the meeting was pre-arranged (R. 827-828). Bux testified that Cirillo told him in the presence of the bondsman that there were several ways in

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which he was thinking of escaping, that Cirillo showed him a photograph of Priess[16] and told him that he wanted to get rid of the government's witness. Bux said Cirillo asked him if he needed money, and Bux answered that he did. Bux was given $5,000 that evening by Cirillo (R. 828-829). According to Bux, Cirillo told him that Priess could be found in a deserted Army barracks and let him know if he saw Priess there (R. 830).

On cross-examination, Bux said he kept $500 of the $5000 paid by Cirillo and gave $4500 to an agent of the BNDD (R. 835).[17] Bux testified that he first mentioned this matter to the authorities after two FBI agents stopped at his store and left word for him to contact them (R. 843-845). Apparently, when Bux learned the FBI was looking for him, he contacted his attorney and then met with the authorities (R. 844).

On cross, Bux' prior criminal record as well as Bux' recent criminal activity was explored. In 1949 at age 16, Bux was arrested for possession of burglar's tools and later sentenced to three years probation (R. 845-846). In 1957, Bux was charged with two bank robberies and one conspiracy to commit a bank robbery and was sentenced to 20 years imprisonment, a sentence which was subsequently reduced to 15 years imprisonment (R. 846). Bux was paroled in 1967 and was to remain on parole until October 9, 1972 (R. 848). Since 1967, Bux admitted to participating in numerous crimes, including three bank robberies while

16. An agent of the BNDD testified that on April 10, 1972, he obtained Cirillo's wallet in connection with legal proceedings and in it found two photographs of Priess (R. 874-875).

17. An agent of the BNDD testified that on the evening of April 8, 1971, Bux gave him an envelope containing $4500 (R. 870-874).

armed, an attempted armored truck robbery in 1970, a jewel robbery in the diamond exchange in 1970, a truck hijacking, approximately 25 or more sales of narcotics, and a "flim flam" (R. 851-861). Bux acknowledged that, although he confessed these crimes to agents of the FBI and BNDD, he had not been arrested or charged with any of them (R. 861-863). He also acknowledged that his parole had not been revoked (R. 863). Bux testified that he had no expectation of being charged with any of these crimes or of having his parole revoked (R. 864).[18]

Although the 3500 material recited that the only promise that was made to Bux by the authorities was that he was to receive protection, the government over appellant's objection was permitted on re-direct to show that the BNDD promised to relocate Bux and his family and to permit him to change his identity (R. 865-870).

Reasons for Granting the Writ

I. A material variance between indictment and proof which allowed the introduction of 220 pounds of heroin from a separate and independent conspiracy in which the petitioner did not participate denied a fair trial and due process.

Introduction

Count 1 of the indictment charged that the petitioner participated in one conspiracy from May, 1971 to March, 1972 to import and distribute narcotics in the United States.

18. At the time of the trial below, Cirillo was indicted for conspiracy to obstruct justice, a charge based on Bux' testimony. Cirillo was tried before a jury and the Honorable Edward Weinfeld on this charge and was found not guilty. *United States* v. *Cirillo*, Cr. No. 72 Cr. 420.

At trial, however, the Government proved not one conspiracy, but two separate and distinct criminal agreements, the first culminating in August and the second in October, 1971. In August, according to the government witness Priess, Signoli, a French heroin dealer, and the petitioner, a buyer, negotiated a deal which was consummated later that month. Priess was present to meet the defendant as Signoli's future representative. In October, however, a plan was created in France by a group unknown to and unconnected with the defendant to sell heroin in the United States. Priess became involved as liaison between the suppliers and the smugglers, and, because he was acquainted with a buyer, he traveled to America intending to contact the defendant in the hope that Cirillo would agree to purchase the drugs. Since Priess was arrested and the conspiracy ended before the appellant was ever contacted about taking part, Cirillo was obviously never a participant in this criminal venture. Yet despite the fact that the petitioner never agreed to participate, never negotiated for delivery, never even knew of the existence of the plan to supply and smuggle the heroin, and never committed any act in furtherance of the conspiracy or to promote the venture, 220 pounds of heroin, seized outside of Paris on October, was admitted into evidence against Cirillo at his trial. There thus existed a variance in the indictment because it combined two independent transactions into one all-encompassing conspiracy. And the variance materially affected the substantial rights of the defendant by allowing the improper insertion of highly damaging and inflammatory matter into the case. A new trial is therefore required where the proof will be limited to evidence properly connected to the defendant and the crime.

I.

Roger Priess, the government's chief witness, testified to the events of both the August and October conspiracies. In August, Priess was brought to the United States by Signoli, a French heroin dealer. The purpose of the trip was to negotiate and sell a heroin cache to Signoli's American buyer. According to Priess, the petitioner was Signoli's buyer. Additionally, since Signoli felt that he had become known to the American authorities, Priess was to be introduced to Cirillo as Signoli's agent for any future narcotics transactions (R. 157-158). In this capacity Priess met Cirillo and Astuto, the petitioner's agent. In several conversations in Miami, a bargain was struck between Cirillo and Signoli, face-to-face negotiations having settled the price at Signoli's figure of $10,500 per kilogram, $500 per kilo more than the defendant originally offered. After the deal was arranged, the heroin was transported from Canada to New York by car. Astuto took possession of the drugs and Signoli received a large cash payment. Priess was told that he could contact Astuto through his girl friend, Barbara Schmidt, "if you need to see him in the future" (R. 230-232) and Astuto told Barbara that Priess would be contacting her "in a couple of weeks" (R. 779). Both Priess and Signoli then returned to Europe.

In September Priess was enlisted by his friend Berdin in Paris as liaison between two French groups, one of which supplied heroin while the other smuggled it. The smugglers planned to sell their merchandise to Soderini, Berdin's buyer in the United States. However, since Berdin's buyer was new, they asked Priess if they could use the buyer he knew as a backstop (R. 261-262). Priess care-

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fully informed Berdin that the buyer he was acquainted with was not his buyer, but Signoli's, and, since Signoli had threatened Priess if he should ever independently attempt to sell to Cirillo, Priess asked Signoli if he could try to sell to the appellant (R. 262-264). Signoli gave his permission, on condition that he receive a share of the $11,000 per kilo that the smugglers planned to ask for in the United States (R. 265-266). Shortly before the operation got under way, the French group decided to try to use the buyer Priess knew because of doubts that Berdin's buyer could produce sufficient cash (R. 279).

On October 7th Priess flew to the United States, while the drugs were placed in a car and driven out of Paris. Within one day, however, both the drugs and Priess were seized by the French and American authorities (R. 290, 508). Priess never contacted either Cirillo or Astuto and, indeed, once in police custody, a supervised attempt to reach Astuto was unsuccessful (R. 313, 415).

Clearly, Cirillo did not participate in the October venture. He knew nothing about it, and indeed was never contacted by the only member of the conspiracy who could contact him, Priess. The petitioner's name was mentioned only as a potential buyer, and it was only in Priess' mind and hopeful expectancies that the appellant would take part. No one ever asked Cirillo.

Since the government could not contend that Cirillo entered into a specific agreement with Priess and the Picpus group to buy their narcotics, it instead suggested, in response to the rule 29 motion based on these grounds, that since a method of contact was established for Priess to

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reach Astuto, the scope of the August conspiracy included the October shipment (R. 878-879). Specifically, the government relied upon the testimony of Priess and Barbara Schmidt, Astuto's girl friend, to the effect that Priess was given Barbara's telephone number, heard her voice on the phone, and that Astuto later told her that Priess would try to contact him through her in a couple of weeks (R. 779). In addition, there are hints of dealings between Cirillo and Signoli prior to August (R. 227).

Significantly, however, the details of an agreement between Cirillo and Signoli are unknown, outside of the specific arrangements for the August shipment. But the critical fact is that whatever the appellant's arrangements were for future deals with Signoli, no contortion of conspiracy law or the facts of this case can extend it to deals with Priess. Certainly, if any communication from Priess were anticipated, it would be expected in Priess' capacity as Signoli's representative. But even assuming that Cirillo had agreed to buy whatever Signoli had to sell, it is quite different from concluding that the scope of the arrangement with Signoli extended to independent deals with Priess and an entirely different group. The establishment of a channel of communication for Signoli's agent is not the equivalent of an agreement to accept indiscriminately any private shipments which the representative developed on his own. "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change" (*United States* v. *Peoni,* 100 F. 2d 401, 403 (2nd Cir. 1938); *United States* v. *Borelli,* 336 F. 2d 376, 385 (2nd Cir. 1964). Certainly, Cirillo did not understand his agree-

ment with Signoli to include Priess' private ventures. After all, the defendant might not have wanted to deal with the Picpus group, for the suppliers, being unknown to him, might not be reliable, the quality of the drug might not be acceptable, or he may have mistrusted the principles. Indeed, Cirillo apparently was wary of Priess himself, as shown by the fact that he carefully made sure Priess was not present at the payoff and crucial conversations with Signoli. Moreover, of obvious importance, the price might have been too high. The Picpus group wanted $11,000 per kilo, a $1,000 per kilo increase in the price Cirillo wanted to pay Signoli, and a $500 per kilo increase in the sum he eventually paid Signoli after negotiations.

It is also obvious that the petitioner's agreement with Signoli in August did not include the October scheme, since Cirillo was not even supposed to be the American buyer for the Picpus group. Rather the group contemplated the sale of the drugs to Soderini, Berdin's buyer in the United States. Since Soderini was a new customer, the smugglers, learning that Priess also knew a buyer, suggested him as a reserve. Priess, however, had first to obtain permission from Signoli even to make contact with Cirillo, the clearest kind of indication that Priess himself considered the October deal an independent one, not within the scope of the Cirillo-Signoli understanding in August, and that the contact Priess wanted to make with Cirillo was not the communication Astuto anticipated in August. When problems eventually arose with Berdin's buyer, the group then suggested using the buyer Priess knew. But, of course, all the decisions made by the participants in France cannot determine the defendant's culpability, for Cirillo was never ap-

proached with the proposition. Signoli's grant of permission to Priess to use Cirillo was simply an acquiescence for Priess to try to make his own deal with the petitioner. Cirillo cannot be made a criminal participant by virtue of Signoli's grant of permission to ask him if he wishes to participate.

Furthermore, though Signoli associated himself in the October venture by asking for a part of the proceeds, Signoli's participation in no way implicates Cirillo. For Judge Learned Hand in *United States* v. *Andolschek,* 142 F. 2d 503, 507 (2nd Cir. 1944) held:

> "It is true that at times courts have spoken as though if A. makes a criminal agreement with B. he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. This is of course an error: the scope of the agreement actually made always measures the conspiracy and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime."

Here, Signoli's casual association in the October transaction does not result in Cirillo becoming a participant because he never agreed to join it and because it was not within the scope of any agreement the appellant and Signoli were shown to have reached in August. Indeed, in order for a defendant to be held for joining a conspiracy, he "must in some sense promote their venture himself, make it his own" (*United States* v. *Falcone,* 109 F. 2d 579, 581 (2nd Cir. 1940)). Here, the petitioner neither promoted the October venture nor did anything to make it his own, for he never even knew about it.

II.

Since it is clear that a variance exists between the indictment and the evidence, two independent conspiracies having been proved instead of the one charged, the inquiry proceeds to whether the variance is material—that is, whether it affects the substantial rights of the accused (*Berger* v. *United States*, 295 U. S. 78, 82 (1935); *United States* v. *Agueci*, 310 F.2d 817, 827 (2nd Cir. 1962)).

In *United States* v. *Berger*, 73 F. 2d 278, 280 (2nd Cir. 1934), rev'd on other gds 295 U. S. 78, *supra*, the court discussed what would affect substantial rights sufficiently to make the variance material and require reversal. Specifically, the court wrote that the variance would be material where surprise hampers the presentation of the defense or where, as in the present case, "it will allow the production of evidence not competent or material to the crime he has committed." Of course, the introduction of highly damaging and inflammatory evidence which is prejudicial to a defendant is itself grounds for reversal because it destroys the defendant's right to a fair trial and denies him due process, regardless of any variance in the indictment. Here, the story of the unconnected October importation scheme, and in particular the introduction in evidence of five suitcases containing 101 kilograms of heroin, together with declarations that Cirillo was a possible buyer, gravely damaged the defendant and prevented a fair determination of the case, both with regard to the conspiracy count and the substantive count.

No court has ever suggested that the production of such a huge amount of heroin for the jury in a narcotics case could be harmless, where the drugs should not have been

admitted. Indeed, far less has been sufficient to require reversal (see, *United States* v. *Russano,* 257 F. 2d 712 (2nd Cir. 1958)). The influence on the jury of such physical evidence is obvious; its impact undoubted. Moreover, the description of Cirillo as a possible buyer of this quantity of heroin drove home to the jury the prejudicial nature of the exhibits. Beyond the visceral persuasion, the presentation of 220 pounds of uncut heroin served as substantial corroboration of Priess' version of the August conspiracy. For although Priess related that the August deal brought 83 kilograms into the country (R. 220-221), the physical corroboration was measured only in micrograms (R. 705). The actual production of a similarly huge amount involved in the October conspiracy, naturally suggested that the operation in August was fully capable of doing what Priess said it did. Moreover, the effect of presenting the actual drugs from October colored the whole case and carried over to the consideration of the substantive count which charged Cirillo with possessing 80 kilograms of heroin in August. For the substantive charge was wholly intertwined with the conspiracy count, and fair consideration could not be given to either of them in an atmosphere rampant with prejudicial influences. Under these circumstances, retrial on the substantive count is required (see, *United States* v. *Varelli,* 407 F. 2d 735, 747-748 (7th Cir. 1969); *United States* v. *Branker,* 395 F. 2d 881, 887-888 (2nd Cir. 1968)).

Indeed, unless the improper introduction of 220 pounds of heroin can by some wishful leap of the imagination be considered harmless or immaterial, a new trial is necessary to accord the defendant due process and a fair hearing, for the overreaching and facile governmental view of conspiracy in this case do neither.

II. The unwarranted and highly inflammatory collateral attack upon the character of the defendant deprived him of a fair trial.

Although charged with a conspiracy to import and distribute narcotics, the government was permitted to splatter the record with testimony that the defendant was a murderer. These allegations were made by Roger Priess and Joseph Bux.

On cross-examination Priess was effectively impeached with his inconsistent statements made before the grand jury and to the authorities (*e.g.*, R. 306-312, 316-318, 331, 337-348, 460-462, 429-431, 436, 440, 445-447). On redirect and over strenuous defense objection, the government was allowed to rehabilitate its reeling witness with an implausible, but highly damaging, collateral attack upon the defendant. Specifically, Priess related that Cirillo had connections with the BNDD and the police in New York, that he was a very dangerous man, that it was better never to talk about Cirillo and that, if he did talk, he would die (R. 486-488).* This alleged fear of Cirillo was hardly a satisfactory explanation; indeed, it made no sense. For the inconsistent statements were given by Priess after he had already fingered the defendant at the time of arrest to the BNDD, the same agency which he was supposedly afraid to talk to.

Having thus with a single excuse resurrected the witness and buried the defendant, the government presented Joseph Bux. Bux' testimony was expensive to the government.

* Though a voir dire resulted in the court's decision to soften the original profer that Cirillo would kill Priess if he talked by referring to him only as "dangerous" (R. 483-484), the witness neglected the instructions when he resumed his testimony before the jury and mentioned murder anyway (R. 488).

In return for his trial story, he was given a free pass for over 30 major felonies, including three armed bank robberies, jewel exchange holdups, an attempted armored car robbery, assorted "flim flams" and at least 25 narcotics transactions. From the lips of this one-man crime wave, the jury was told how Cirillo planned to locate and murder the government's chief witness, Priess, and that because even the outlaw Bux was apparently afraid of Cirillo, Bux would be given a new identity and relocated by the government (R. 821-830, 861-870). Thus, the trial created an issue of the defendant's character and a portrayal of the appellant as a killer, irresistibly drawing the attention of the jury away from the proper issues before it. This inflammatory assault upon the defendant denied him a fair trial.

The court, recognizing the inherent danger in the nature of the proof offered, advised the jury of the limited probity of the testimony. But "the naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction" (*Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949); also see, *Bruton* v. *United States*, 391 U.S. 123 (1968); *United States* v. *Semensohn*, 421 F. 2d 1206, 1208 (2nd Cir. 1970). It is especially fictitious where mechanical instructions are relied upon to control the emotional rage inevitably felt towards murder.

The damage was further accentuated in this case because the defense to the allegations could not realistically be used. Cirillo and three others had already been indicted for obstructing justice on the strength of Bux' story.* The

*72 Cr. 420.

primary witness to the truth of falsity of Bux' account—the bondsman in whose office and presence the plan was allegedly concocted—was one of the co-defendants. He could not be expected to sacrifice himself to government cross-examination in the instant case before his own trial commenced. And predictably, when he denied the tale of the highly-motivated Bux, the bondsman, Cirillo and the other two co-defendants were found not guilty by a jury, one month after the defendant was convicted in this case. Ironically, had the second trial preceded the first, Bux' narrative could never have been used. The government thus had the advantage of smearing the defendant with allegations which could not be rebutted at the time they were made, but which, upon full exploration at a trial, were totally rejected by a jury.

An overview of the collateral testimony thus presents a disquieting picture. First, to excuse his own inconsistencies, Priess alleged that he lied about significant details because he was afraid the defendant would kill him, an excuse belied by the fact that Priess instantly implicated the defendant. With the jury now informed that Priess felt the defendant capable of murder, the tale, later found untrue by a jury, that Cirillo actually intended to murder Priess was introduced. The implausible account of Priess and the untrue tale of Bux thus fed upon each other, as each tended to heighten the impact and bolster acceptability of the other story. The end result was to apprise the jury that Cirillo was a very dangerous character and should be put in jail. With emotions thus stimulated in a way which jeopardized a dispassionate examination of the case, a new trial is required, free of the sinister implications of the collateral and inflammatory matter.

III. The jury was improperly allowed to consider hearsay evidence of co-conspirators to determine whether the petitioner joined the conspiracy.

In its charge, the court instructed the jury that it could examine with equal emphasis both hearsay and non-hearsay evidence to determine whether the defendant participated in the conspiracy.

> "His participation in the conspiracy, if you find one did exist, must be established by the independent evidence of Cirillo's own acts, his own statements and conduct, as well as those of the other alleged co-conspirators and the reasonable inferences to be drawn therefrom" (R. 990).

Exception was taken on the ground that this formulation would readily permit the jury to determine the defendant's participation from the hearsay proof (R. 1021-1022).

The charge given was consistent with the rule in the Second Circuit, which has put the burden on the court to decide whether independent evidence is sufficient to allow the hearsay evidence to be used in its entirety (see, *United States* v. *Nuccio*, 373 F. 2d 168 (2d Cir. 1967); *United States* v. *Geaney*, 417 F.2d 1116, 1119-21 (1969); *United States* v. *Lopez*, 420 F.2d 313, 317-18 (1969); *United States* v. *Tyminski*, 418 F.2d 1060, 1062 (1969).) Yet decisions in this Court, as well as in other circuits, suggest a contrary rule. Instead, it should be the jury which must review the adequacy of independent evidence to implicate the defendant in a conspiracy separately, and it may not consider verbal hearsay declarations of someone else, outside the presence of the defendant, in deciding whether the government has proven a conspiracy or the defendant is implicated in it.

In *Glasser* v. *United States*, 315 U.S. 60, 74-5 (1942) this Court stated that the declarations of a co-conspirator were admissible against a defendant "only if there is proof *aliunde* that he is connected with the conspiracy • • • Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." Who decides whether there is independent proof, or how much independent proof is needed was specifically left open (*ibid.*). Cases in other jurisdictions, however, do not accept the Second Circuit's view, approving instead jury consideration of conspiracy and participation in the conspiracy on the basis of proof independent of the hearsay (*Greer* v. *United States*, 134 F.2d 912 (5th Cir. 1943); *Schmeller* v. *United States*, 143 F.2d 544, 550-1 (6th Cir. 1944); *United States* v. *Vida*, 370 F.2d 759, 766 (6th Cir. 1966); *Commonwealth* v. *Rogers*, 18 Mass. 184, 192-4, 63 N.E. 421, 425-6 (1902); *contra, Carbo* v. *United States*, 314 F.2d 718, 735-8 (9th Cir. 1963)).

Indeed, the danger inherent in the Second Circuit rule is saliently pointed out by the dissent in *United States* v. *Calarco*, 424 F.2d 657, at 664 (2d Cir. 1970),

> "In some circumstances—and may not the present case be one?—a black lie about the absent defendant's role and orders would be the most efficacious utterance to advance the crime • • • and the most damning if treated as competent evidence of the complicity of the absent defendant."

In the case at bar this fear is buttressed by realism. For the proof *aliunde* against Cirillo was almost non-existent. Indeed, even if he had some knowledge of the conspiracy, a factor insufficient to convict (see, *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949)), there is little proof that he

had any stake in the outcome of the venture, or promoted the venture himself, making it his own, as Judge Learned Hand required for a conspirator (*United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir. 1940)). The degree of Cirillo's participation or stake in the venture is suggested only by the hearsay declarations of Priess. Thus, in the words of *Glasser*, the hearsay in the present case lifted itself by its own bootstraps to the level of competent evidence (315 U.S. at 75, *supra*). Petitioner thus urges that Second Circuit rule permits, as it did here, a conviction predicated completely on hearsay declarations, there being no adequate independent evidence of petitioner's enlistment in the conspiracy.

Conclusion

The writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Petitioner
401 Broadway
New York, New York 10013
(212) WA 5-5937

ALAN SCRIBNER
IVAN S. FISHER
JOEL FINKELSTEIN
Of Counsel

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 298—September Term, 1972.

(Argued October 20, 1972 Decided November 6, 1972.)

Docket No. 72-1618

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS CIBILLO,

Defendant-Appellant.

Before:

WATERMAN, SMITH and KAUFMAN, *Circuit Judges.*

Appeal from a judgment of conviction, after a jury trial, entered in the United States District Court for the Southern District of New York, Edward Weinfeld, *J.*, for conspiring to import, possess with intent to distribute, and distribute narcotic drugs, 21 U.S.C. §§846, 963, and possession of heroin with intent to distribute, 21 U.S.C. §§812, 841 (a) (1), 841(b)(2), 18 U.S.C. §2.

Affirmed.

ALBERT J. KRIEGER, New York, N.Y., *for Appellant.*

Appendix

WHITNEY NORTH SEYMOUR, JR., United States Attorney for the Southern District of New York (Arthur J. Viviani, Dean C. Rohrer, and Peter F. Rient, of Counsel), *for appellee.*

KAUFMAN, *Circuit Judge*:

This appeal, from a judgment of conviction for violation of federal narcotics laws, takes us on a voyage of international intrigue. Events in France, Canada, and the United States provide the factual context against which we are asked to decide whether Louis Cirillo's two count conviction, for conspiracy to import, possess with intent to distribute, and distribute narcotics, 21 U.S.C. §§846 and 963, and for the substantive offense of possession of heroin, 21 U.S.C. §§812, 841 (a) (1), 841 (b) (2), and 18 U.S.C. §2, may stand. We hold that it may and affirm the conviction.

Since the critical inquiry in any conspiracy case involves a determination of the "kind of agreement or understanding that existed as to each defendant * * * as he understood it," *United States* v. *Bennett*, 409 F.2d 888, 893 (2d Cir.), *cert. denied sub nom. Haywood* v. *United States*, 396 U.S. 852 (1969); *see also, United States* v. *Borelli*, 330 F.2d 376 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965), it is profitable at this juncture to recount the dramatic facts of this case.

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1. Cirillo was indicted on March 17, 1972. He was tried before Judge Weinfeld and a jury, and a judgment of conviction on both counts was entered on May 25, 1972. Cirillo, a prior federal narcotics offender, was sentenced to concurrent 25 year terms of imprisonment to be followed by concurrent special parole terms of 6 years.

Appendix

The Government's proof[2] relied principally on the testimony of a Frenchman, Roger Preiss, a named, but not indicted, co-conspirator.[3] His role in this saga, as he himself described it, was that of "go-between" for French sellers of heroin and for their American buyer. As a party to all conferences and transactions connected with the conspiracy, Preiss was ideally suited to play the role of Greek chorus and narrator of the events in question. His testimony embraced two transactions, one in August, 1971, and another in September and October, 1971; we adopt this division here for descriptive purposes.

The August Transaction

The evidence revealed a daring plan to smuggle 83 kilograms of pure heroin into the United States by hiding the narcotics behind and beneath the panels and floor board of an automobile, destined to be shipped from France to Canada and from there brought across the border into America. This ingenious, albeit misguided, scheme was the brainchild of a quartet of Frenchmen: Joseph Signoli, the principal seller; Andre Labay, a smuggler; Richard Berdin, a contact man; and Roger Preiss, a close friend of Berdin's. Berdin recruited Preiss to accompany Signoli on a trip to the United States, there to receive and deliver the heroin to Signoli's American buyer.

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2. The defense called no witnesses.

3. Cirillo was the only conspirator to be charged as a defendant. In addition to Preiss, the following persons were named as co-conspirators but not as defendants: John Astuto, Richard Berdin, Antoine Grisoni, Andre Labay, Andre Lajoux, Michel Mastantuono and Joseph Signoli.

Appendix

Preliminary arrangements in Paris occupied the participants' time through much of late spring and the early summer of 1971. By August 10, however, armed with fraudulent passports acquired from a Pigalle hairdresser, Preiss and Signoli departed by train for Frankfurt, Germany. En route, Signoli gave Preiss $2,000 and two telephone numbers and addresses, said to belong to Signoli's buyer. As the government's proof later showed, the numbers and addresses referred to apartments in Miami and New York used by the appellant, Louis Cirillo.

From Frankfurt, Preiss—travelling under the name Patrick Lorentz—and Signoli—adopting the alias, Yvon Tournier—flew to Montreal where they were met by Michel Mastantuono and his fiancee. After two days in Montreal —to what end the record does not make clear—Preiss, on Signoli's instructions, flew to Miami, where he was joined by Sngnoli the following day, August 14. Signoli immediately made plans to meet with Cirillo later in the afternoon. Although Preiss was not present at that meeting, while strolling about the city he observed Signoli and Cirillo seated at a table in a Howard Johnson restaurant. Later, Preiss informed Signoli that he had seen Signoli with the American buyer. Signoli then told Preiss that the addresses and telephone numbers he had been given on the train to Frankfurt were Cirillo's. Preiss was told he would soon meet Cirillo and he was cautioned not to mention to Cirillo that he had Cirillo's telephone number.

Shortly thereafter, on August 15, or 16, Preiss did meet with Cirillo. A rendezvous was scheduled for a restaurant in Miami, where Signoli, Preiss, Cirillo and John Astuto, Cirillo's aide, assembled. Signoli introduced Preiss as his

"future representative • • • in the United States," and said that Preiss would remain in America for six months. Cirillo, in turn, introduced Astuto to Preiss as a contact man, saying, "when you need to see me, you have any problem for the drugs, you know, in the future, you see this man," pointing to Astuto. A short while later, the four men left the restaurant and went to Cirillo's Miami apartment. There it was agreed that Cirillo would pay $10,500 per kilogram of heroin, with delivery scheduled for New York within the week.

The scheme continued to work smoothly as the conspiratorial group moved north. Preiss and Signoli flew to New York on August 20 and met briefly with Astuto. A day or two later, Mastantuono, the Montreal connection, met with Signoli, Preiss and an unidentified man from Marseilles, in front of St. Patrick's Cathedral on 5th Avenue, and identified a red car parked on the street as the vehicle that had been brought from Canada carrying the drugs. At a coffee shop nearby, Signoli and Preiss then met briefly with Cirillo and Astuto. Signoli told Cirillo that there were no problems and that "everything is okay."

The following morning, August 22, at 7:30 A.M., Preiss, Signoli, Astuto, Mastantuono, and the man from Marseilles, drove the car with narcotics to a home in Fort Lee, New Jersey, where the car was placed in the garage. During the next four hours the car was torn apart. With the aid of diagrams produced by Mastantuono, the conspirators located 83 kilograms of heroin, packaged in clear plastic bags of half-kilo weight, and removed them from a variety of hidden recesses in the door panels, under the floor board

and beneath the roof. At one point Preiss removed a bag and it tore, with heroin falling to the floor of the car and the garage.[4] After all the heroin had been removed from the car and carried into the house, the men returned to Manhattan. At dinner, with Signoli, Preiss and the man from Marseilles, Astuto told his companions that Cirillo had arranged a celebration for them that evening. Signoli explained that it was Cirillo's custom to have such parties "after each operation."

The party held in a Manhattan apartment was not only a social event but an occasion for making important plans for future dealings as well. Astuto, Signoli, Preiss, and the man from Marseilles, arrived at about 11 P.M. Cirillo joined them two hours later and indicated that all of the heroin unloaded from the car was acceptable, including two half-kilo bags over which there had been some concern because of the yellow color of their contents. Cirillo then turned to Preiss and instructed him that future contacts with Astuto would be made indirectly through a third person whose voice Cirillo wanted Preiss to hear on the telephone. A call was then made to Barbara Schmidt, a former girl friend of Astuto's. Astuto told Preiss in Cirillo's presence that he could always be contacted through Barbara.

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4. The 83 kilograms of heroin was never recovered by federal authorities. However, on February 2, 1972, a United States chemist searched the Fort Lee garage pursuant to a search warrant. He vacuumed the floor into a millipore filter attached to the hose of a vacuum pump. After analysis, the chemist concluded that traces of heroin were present in areas corresponding to the places where Preiss said they had spilled and over the route he had walked when he carried the torn packet to a nearby bench. These traces of heroin were admitted in evidence against Cirillo at the trial.

The eventful day then quickly drew to a close when Cirillo insisted on paying Signoli for the drugs in private. The following day Preiss and Signoli discussed their plans for separation. Preiss informed Signoli that he had decided not to stay in America for six months but would return to Europe in the near future. Signoli assented and gave Preiss $2,000 from a suitcase filled with $100 bills and totaling about $300,000. He also handed him two telephone numbers at which Signoli could be reached in Marseilles. Preiss left the United States two or three days later and eventually returned to Paris.

The September-October Transaction

Roger Preiss testified also to a narcotics transaction spanning the month of September and early October, 1971. Upon his return to France from New York, Preiss was again contacted by Richard Berdin, the man who originally had brought Preiss and Signoli together. Berdin informed Preiss that the ingenious Andre Labay had developed a new and expeditious means of importing heroin into the United States—this time by hiding drugs in special luggage and transporting it from France to America by air. Berdin suggested an initial shipment of 100 kilograms, to be sold to one named Soderini, Berdin's buyer in America. Preiss was assigned the role of liaison between the French suppliers—Antoine Grisoni and Andre Lajoux—and Labay. Preiss met with Grisoni and Lajoux and arrangements for the supply of heroin were made.

Berdin prepared to leave for the United States to make contact with his buyer, Soderini, but complications soon

developed. Labay insisted upon payment for the narcotics on delivery, and Berdin, who had not previously dealt with Soderini, became uneasy, unsure whether Soderini would be able to meet the terms of purchase. Consequently, Berdin asked Preiss if Preiss would arrange to have his own American buyer take the responsibility for purchasing 100 kilograms of heroin. Preiss, having told Berdin that he needed Signoli's prior approval to deal with Cirillo—explaining that Signoli had threatened him with death should he deal with Cirillo without Signoli's consent—then flew to Marseilles where he told Signoli of the 100 kilo shipment. Signoli gave his approval to the sale of drugs to Cirillo, but not without first insisting on a part of the payment for himself.

On October 6, 1971, Preiss met Lajoux and was given the key to an automobile containing 100 kilograms of heroin. Preiss brought the car to Labay who drove it to a small town outside of Paris, where he was arrested by French narcotics agents.[5] Preiss landed in New York on October 7 and, upon his arrival at the Waldorf Astoria, he was arrested. By that time, all the co-conspirators, with the exception of Astuto, who was never apprehended, had been placed under arrest.

II.

Multiple or Single Conspiracy

Cirillo's principal argument on appeal is one not infrequently heard in complicated conspiracy cases, *see, e.g.,*

5. 101 kilograms of heroin, seized from Labay, were introduced against Cirillo at trial.

United States v. *Bennett, supra*; *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965) *cert. denied* 384 U.S. 947 (1966); *United States* v. *Borelli, supra; United States* v. *Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); and *United States* v. *Russano*, 257 F.2d 712 (2d Cir. 1958); *cf. Kotteakos* v. *United States*, 328 U.S. 750 (1946). The claim is that although the indictment concededly charged only one on-going conspiracy involving two transactions, the proof at trial actually showed two independent conspiracies.[6]

Our review of the evidence adduced at trial, viewed in a manner most favorable to the Government, *see e.g., United States* v. *Kelly, supra; United States* v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied sub nom. Corallo* v. *United States*, 375 U.S. 835 (1963), convinces us that there was ample evidence of a single, ongoing, continuous conspiracy, and that Cirillo's claim of variance between indictment and proof is unfounded. It can hardly seriously be contended that the facts of this case make out a so-called "spoke" conspiracy which concerned the Supreme Court in the *Kotteakos* case, where at least eight, separate and independent conspiracies had been proved. *Kotteakos* v. *United States, supra*, 328 U.S. at 754-55. This case is the archetype of a "chain" conspiracy, *see e.g., United States*

6. Cirillo argues that the introduction against him of evidence relating to the September-October transaction—including 101 kilograms of heroin—so prejudiced his right to a fair trial that the variance between indictment and proof cannot be considered other than material. *Cf. United States* v. *Berger*, 295 U.S. 78 (1935); *see generally*, Note, *Developments in the Law of Criminal Conspiracy*, 72 Harv.L.Rev. 920, 991-93 (1959). The claim is a serious one in view of the imposing effect evidence of the second transaction may have had on the jury's deliberations.

v. *Bruno*, 105 F.2d 921 (2d Cir.) *rev'd on other grounds*, 308 U.S. 287 (1939); *United States* v. *Stromberg*, *supra*; *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962) *cert. denied*, 372 U.S. 959 (1963); *see generally*, Note, *Federal Treatment of Multiple Conspiracies*, 57 Colum. L. Rev. 387, 388-393 (1957), with links connecting the conspirators at the critical nexus points of exportation, transportation and distribution of narcotics. And here we need not concern ourselves with whether persons at the extreme end of a "chain" conspiracy adopt the attributes of participants in a "spoke" conspiracy, *see United States* v. *Borelli*, *supra*, 336 F.2d at 383, inasmuch as the protagonists of this drama —Cirillo, Signoli, Preiss, Astuto, Berdin and Labay— constituted the very core of an agreement, among the conspiratorial hierarchy, to illegally import heroin on a large scale for distribution in the United States. Upon all the evidence, a rational inference could be drawn that the agreement was not limited to the importation of 83 kilograms of heroin in the August, 1971 transaction, but that it extended to future shipments as well. These men were engaged in the business of importing and distributing heroin whenever the chance presented itself. Of this there can be no doubt, in view of the abundant evidence in the record of proposed future dealings—not the least of which are Cirillo's representations to Preiss and Signoli that Astuto would serve as Cirillo's contact man in the future, and the elaborate communications system designed to facilitate future contacts established between Preiss, Cirillo and Astuto, after the completion of the August transaction. Although Cirillo may not have known that the September-October shipment of 101 kilograms of heroin was destined

for his distribution network, its importation was well within the conspiratorial plan which he had embraced as his own just one month earlier. The district judge in his refusal to direct an acquittal made the correct judgment that a jury might reasonably have believed that the actions of Labay, Preiss and Signoli relating to the September-October shipment were within the scope of the agreement as Cirillo understood it; he expected future deliveries of heroin, and they undertook to supply it.

The appellant would have us characterize the second shipment of narcotics—the September-October transaction —as an independent venture undertaken by Berdin and Preiss, which only later brought in Signoli, and which never involved Cirillo. Cirillo advances the proposition, a novel one at best, that despite the underlying conspiratorial agreement, "all the decisions made by the participants in France cannot determine the defendant's culpability, for Cirillo was never approached with the proposition." This argument is plainly incorrect for conspiracies are most often agreements in flux, and we have held on other occasions that a defendant, once found to have been a member of the conspiracy, whatever his level of participation, may be criminally responsible for the acts of persons of whose existence he is unaware, *see*, e.g., *United States* v. *Stromberg, supra*, 268 F.2d at 264. Having concluded that it could rationally have been inferred that the conspiratorial agreement to which Cirillo was a party encompassed not merely a single shipment of narcotics, but extended as well to future transactions, Cirillo's unawareness that the narcotics he had solicited were in transit does not relieve him

of culpability. This is so particularly in view of the fact that the buyer of heroin in the August transaction was not informed of the shipment until it arrived in America. At the very least, this would indicate that the agreement did not contemplate prior "in transit" notice. We would not require the Government to prove that the agreement in a conspiracy case necessitated a precise advance definition of each member's role, *see, United States* v. *Bennett, supra*, 409 F.2d at 893. A conspiracy, once established, is presumed to continue until the contrary is shown, *United States* v. *Stromberg, supra*, 268 F.2d at 263; *cf. Hyde* v. *United States*, 225 U.S. 347 (1912). And we state now, as we have stated before, that "participation in a conspiracy may continue beyond the performance of an overt act by the alleged conspirator, if the conspiracy continues in existence thereafter; affirmative proof of withdrawal is generally required," to terminate liability, *United States* v. *Cianchetti*, 315 F.2d 584, 589 (2d Cir. 1963), proof that most certainly was not forthcoming in behalf of Cirillo. The cases upon which appellant relies, *e.g. United States* v. *Russano, supra*, in which the evidence indicated that the first conspiracy had ceased between 1952 and 1955, when the second commenced, and *United States* v. *Borelli, supra*, which involved two phases of a conspiracy separated, at their point of commencement, by a period of approximately eight years, are simply inapposite to the situation involved here, in which the second shipment followed the first by a period of one month, and in which the principal figures in each transaction were the same.

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Appendix

Other Claims

Three subsidiary questions are left for our brief consideration. On cross-examination Preiss was compelled to admit that in prior statements to narcotics agents, and in his testimony before the grand jury, he had failed to mention his meeting with Cirillo, either at Cirillo's apartment in Miami, or at the party held in New York. In an attempt to rehabilitate the witness on redirect, the government tendered an offer of proof and a hearing was held by Judge Weinfeld outside the presence of the jury. Preiss stated, in essence, that he did not mention the meetings with Cirillo because he feared that Cirillo would kill him if he did. According to Preiss, Signoli had told him that Cirillo had contacts with the Miami office of the Bureau of Narcotics and Dangerous Drugs, and with the New York City Police Department. Signoli further stated that Cirillo would be notified in the event Preiss informed on Cirillo and that Preiss would then be killed. Preiss then was permitted to relate these facts in open court, but not before the trial judge cautioned the jury that the statements were admitted solely for the purpose of explaining away any inconsistency brought out on cross-examination. The same cautionary instructions were given, in substance, in the court's final charge. Cirillo contends that this redirect examination improperly brought his character into question, and denied him a fair trial.

The general rule, however, and one that is eminently logical, is that an "impeached witness may always endeavor to explain away the effect of [a] supposed inconsistency by relating whatever circumstances would naturally remove

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it." 3A Wigmore, Evidence §1044, p. 1062 (Chadbourn rev. 1970). The rule is followed in this Circuit, *see United States* v. *Berger*, 433 F.2d 680, 683-84 (1970), *cert. denied*, 401 U.S. 962 (1971); *United States* v. *Franzese*, 392 F.2d 954, 960-61 (1968), *vacated on other grounds*, 394 U.S. 310 (1969), and we abide by it here.

Cirillo also asserts that he was denied a fair trial by virtue of the admission of testimony of one Joseph Bux. Bux testified that in March, 1972, he met with Cirillo and a bail bondsman in the bailbondsman's office in Manhattan. During the course of this meeting, Bux stated, Cirillo told of his plans of escaping the surveillance of narcotics agents and of preventing Preiss from testifying. According to Bux, Cirillo showed him a photograph of Preiss, told Bux that Preiss could be found at a deserted barracks in Staten Island, and requested Bux to find the barracks and determine if Preiss was actually there. Cirillo then stated he wanted to "get rid of" Preiss. Cirillo claims this testimony also brought his character into question and diverted the jury's attention from the main issues in the case.

While the testimony may very likely have worked to prejudice the appellant, it did so because evidence was damning, not because its introduction was error. Evidence of conduct designed to impede or prevent a witness from testifying is admissible as showing consciousness of guilt, 2 Wigmore, Evidence §278 at 124 (3d ed. 1940); *cf. United States* v. *Culotta*, 413 F.2d 1343, 1346 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970). Judge Weinfeld's careful cautionary instructions as to the limited purpose for which the evidence was introduced, delivered prior to the admis-

sion of Bux's testimony and repeated in the closing charge, secured to Cirillo all the protection to which he was entitled.

Finally, Cirillo asserts that in conspiracy cases the jury, and not the judge, should make an assessment of whether there is sufficient, independent, non-hearsay evidence to establish a conspiracy and the defendant's participation in it. Suffice it to say that the approach in this Circuit, as appellant concedes, is otherwise, *see e.g., United States* v. *Stromberg, supra,* 268 F.2d at 265-66.

Cirillo's conviction is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-958

LOUIS CIRILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted on both counts of a two count indictment charging him with (1) conspiracy to import heroin, to possess heroin with intent to distribute, and to distribute it in violation of 21 U.S.C. 846 and 963, and (2) the substantive offense of possession of heroin in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(2). He was sentenced to concurrent prison terms of 25 years, followed by concurrent special parole terms of six years.[1] The court of

[1] Petitioner was sentenced as a prior federal narcotics offender.

appeals affirmed in a comprehensive opinion which sets forth the facts of the case in detail (Pet. App. 1a-15a).

1. Petitioner's primary claim is that although the indictment charged one conspiracy involving two transactions, the facts in his view show two separate conspiracies, and, at most, his participation in the first conspiracy. He also contends that his character was improperly attacked at trial by testimony that he was prepared to have a key government witness murdered. Both of these contentions are answered in the opinion of the court of appeals (Pet. App. 8a-12a, 13a-15a) on which we rely.

2. Petitioner finally contends that the trial court erred in instructing the jury that they could consider hearsay statements of co-conspirators in determining his participation in the conspiracy. The court instructed the jury that (R. 990):

> His [Cirillo's] participation in the conspiracy, if you find one did exist, must be established by the independent evidence of Cirillo's own acts, his own statements and conduct, as well as those of the other alleged co-conspirators and the reasonable inferences to be drawn therefrom.

Petitioner contends that the jury should have been instructed that it may not consider the hearsay statements until it has determined from the non-hearsay evidence that the defendant was a member of the conspiracy.

The instruction given was proper under a long line of decisions in the Second Circuit holding that the trial

judge may instruct the jury that the participation of any defendant in a conspiracy can be established by evidence of the acts and statements of other alleged conspirators.[2] Under this rule the trial judge: "must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility * * * declare a mistrial if the defendant asks for it."[3] This rule is also followed in the Ninth, the Fifth and the Third Circuits. See, *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953; *United States* v. *Bey,* 437 F. 2d 188 (C.A. 3); *Orser* v. *United States,* 362 F. 2d 580, 585-586 (C.A. 5).

The Second Circuit rule followed in this case results in a presentation of the issues to the jury in a simpler and more comprehensible fashion than was required under the older procedure contended for by petitioner. At the same time it safeguards the rights of the de-

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[2] See cases cited in *United States* v. *Projansky,* 465 F. 2d 123, 137, n. 26 ((C.A. 2), certiorari denied, Nos. 72-135 and 72-272, November 13, 1972.

[3] *United States* v. *Geaney,* 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States,* 397 U.S. 1028.

fendant in that the judge must determine as a matter of law whether the evidence of his membership in the conspiracy is sufficient to warrant submission of that issue to the jury. As noted in *Carbo* v. *United States, supra,* 314 F. 2d at 737, this approach is consistent with the usual allocation of functions between judge and jury which assigns to the judge the task of deciding preliminary questions of fact determinative of the admissibility of evidence. Under the older rule the jury made this initial determination. Whichever rule is applied, however, once that initial determination is made the jury may properly consider all the evidence including declarations of co-conspirators in determining guilt beyond a reasonable doubt. Since it is established that only slight evidence is necessary to show a defendant's connection with an existing conspiracy for these purposes, it is evident that the difference in the two methods of presentation is more theoretical than real. That is particularly so in a case such as this, where, as the opinion below shows, there was ample evidence of acts and statements by petitioner to establish his connection with the conspiracy.[4]

This Court has not considered this difference in procedure among the Circuits to be an issue requiring resolution. See *United States* v. *Jacobs,* 431 F. 2d 754 (C.A. 2), certiorari denied, 402 U.S. 950; *Carbo* v.

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[4] Petitioner's argument evidences some confusion as to what constitutes hearsay. The acts and statements of petitioner and the acts of the other conspirators testified to by the government's witnesses and the real evidence, such as the paper with the telephone numbers and addresses of petitioner, were not hearsay and were ample to show petitioner's connection with the conspiracy.

United States, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953; *United States* v. *Projansky*, 465 F. 2d 123 (C.A. 2), certiorari denied, November 13, 1972, Nos. 72-135 and 72-272. There is no reason to review that issue in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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